Federal Communications Commission
Washington, D.C. 20554

June 24, 2005

DA 05-1710
In Reply Refer to:
1800B3-NS

WKML License Limited Partnership
c/o Sally A. Buckman, Esq.
Leventhal Senter & Lerman, PLLC
2000 K Street, NW
Suite 600
Washington, DC 20006-1809

In re: WGQR(FM), Elizabethtown, NC
Facility ID No. 60881
File No. BAL-20040628AAY

WBLA(AM), Elizabethtown, NC
Facility ID No. 59467
File No. BAL-20040628AAX

Applications for Assignment of Licenses

Dear Ms. Buckman:

We have before us the above-captioned applications for assignment of the licenses (the "Assignment Applications") for stations WGQR(FM) and WBLA(AM), both licensed to Elizabethtown, North Carolina (the "Stations"), from Sound Business of Elizabethtown, Inc. ("Sound Business") to WKML License Limited Partnership, a subsidiary of Beasley Broadcast Group (collectively, "Beasley"). On November 8, 2004, Beasley amended its application to seek a waiver of the local radio ownership rule, Section 73.3555(a),[1] with respect to WGQR(FM) (the "Waiver Request"), and further amended the application on April 15, 2005 to supplement that request ("Supplement"). For the reasons set forth below, we deny the Waiver Request, as supplemented, and dismiss the Assignment Applications.

---

[1] 47 C.F.R. § 73.3555(a). At the time they were filed, the Assignment Applications were subject to competition review in light of the fact that Beasley's six stations in the Metro (*see infra* p. 3*)* garner more than 50% of the advertising revenues. The Applications were placed on Public Notice as accepted for filing on September 20, 2004. Once new application forms reflecting the revised local radio ownership rule (discussed *infra*) had been approved by the Office of Management and Budget and released, the Commission required pending applications to be amended to show compliance with, or to request a waiver of, the new rule. Beasley then filed its Waiver Request.

Background

In its omnibus ownership order released July 2, 2003,[2] the Commission adopted a new, geography-based definition of radio market based on Arbitron's Metro Survey Areas ("Metros") as reported by BIA.[3] This new market definition is used to determine compliance with the numerical limits under Section 73.3555(a) in Arbitron-rated markets. Although the Third Circuit Court of Appeals subsequently stayed the effective date of all the new rules set forth in the *Ownership Order,*[4] the Court partially lifted the stay in response to the Commission's Petition for Rehearing, such that the new local radio ownership rule took effect on September 3, 2004.[5]

The Commission decided in the *Ownership Order* to rely on BIA data rather than Arbitron's own reports.[6] The Commission "count[s] as being in an Arbitron Metro above-the-line radio stations (*i.e.,* stations that are listed as 'home' to that Metro), as determined by BIA."[7] The Commission recognized that companies often successfully petition Arbitron to change a station's home designation, *i.e.,* "opt in" or "opt out" of a Metro in certain circumstances.[8] As "safeguards to deter parties from attempting to manipulate" the relevant data "for purposes of circumventing the local radio ownership rule," the Commission established a two-year waiting period for changes in Arbitron Metro boundaries and BIA home market designations.[9] Based on the Commission's pronouncements, the revised radio application

---

[2] *See 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13711-13747 (2003) ("*Ownership Order*"), *aff'd in part and remanded in part*, *Prometheus Radio Project, et al. v. F.C.C.*, 373 F.3d 372 (2004) ("*Prometheus Remand Order*"), *stay modified on rehearing*, No. 03-3388 (3d Cir. Sept. 3, 2004) ("*Prometheus Rehearing Order*"), *cert. denied,* 73 U.S.L.W. 3466 (U.S. June 13, 2005) (Nos. 04-1020, 04-1033, 04-1036, 04-1045, 04-1168 and 04-1177).

[3] *See Ownership Order*, 18 FCC Rcd at 13724-28.

[4] *Prometheus Radio Project, et al. v. F.C.C.*, No. 03-3388 (3d Cir. Sept. 3, 2004) (*per curiam*) (granting motion for stay of effective date). *See also Prometheus Remand Order,* 373 F.3d at 435 (continuing the stay pending review of the Commission's action on remand).

[5] *See Prometheus Rehearing Order, supra* note 2.

[6] The Commission recognized that the BIA database does not always mirror Arbitron's, as BIA "builds upon Arbitron's data to provide greater detail about the competitive realities in Metro markets." *Ownership Order,* 18 FCC Rcd at 13727. "BIA may . . . determine on its own whether a particular station licensed to a community outside of a Metro should be listed as 'home' to that Metro." *Id.* n.587. *See also id.* at 13726, 13728 and n.593.

[7] *Id.* at 13727. The Commission also counts as being in the market any station whose community of license is located within the Metro's geographic boundary regardless of the station's BIA listing. *See, e.g., id.*

[8] In its April 2005 Supplement, Beasley attaches a letter from Mark Fratrick, Vice President of BIA Financial Network (the "*BIA Letter*"), which confirms that BIA changed the home designation of WGQR(FM) "after receiving notice from The Arbitron Ratings Co. that it no longer considered WGQR(FM) as home" to the Metro.

[9] *See* 18 FCC Rcd at 13726.

forms explain that applicants may not rely on BIA data changes made after the effective date of the new rule -- September 3, 2004 -- unless the change has been in effect for two years.[10]

BIA listed WGQR(FM) as home to the Fayetteville, North Carolina Metro (the "Fayetteville Metro") for two years prior to September 3, 2004, and likely for years prior to that,[11] and continued to list it above the line until November 5, 2004.[12] BIA includes 21 commercial and noncommercial stations above the line in the Metro.[13] In this size market, a party may have a cognizable interest in up to 6 commercial stations, with not more than 4 in the same service (AM or FM).[14] Beasley controls the largest number of stations in the Metro, collects the greatest revenues, and holds the greatest audience share. It has a cognizable interest in 2 AM and 4 FM stations in the Metro (the "Beasley Stations"), all in North Carolina: WKML(FM), Lumberton; WZFX(FM), Whiteville; WFLB(FM), Laurinburg; WUKS(FM), St. Pauls; WAZZ(AM), Fayetteville; and WTEL(AM), Red Springs. Thus, it is currently at the limit for a local radio market of this size and cannot acquire WGQR(FM) absent a waiver.

Beasley acknowledges that Fayetteville Metro is the "presumptive radio market" under Section 73.3555(a). It argues, however, that the station's historical listing by both Arbitron and BIA as home to the Metro "has been an aberration," and that the station's recent "delisting is entirely in keeping with

---

[10] *See, e.g.,* FCC Form 314 (September 2004), Worksheet No. 3 at 3 (stating that applicants may not rely on "removal, after September 3, 2004, of their own stations from BIA's list of "home" stations in a Metro" unless such exclusion has been in effect for at least two years . . ."). Although July 2, 2003, was the Commission's original reference point for BIA data (*see*, *e.g.,* FCC Form 314 (July 2003), Worksheet No. 3 at 3), the Court's stay of the new rules meant that BIA data were not being used generally to assess compliance with Section 73.3555(a). Upon lifting of the stay on September 3, 2004, that date became the new reference point for purposes of tracking changes to BIA data. Radio broadcasters had ample notice of the Commission's determination that a two-year waiting period was part and parcel of the geography-based methodology.

[11] The Waiver Request (at 1 n.4) indicates that WGQR(FM) had been designated by BIA as home to the Fayetteville Metro for at least two years preceding September 3, 2004, but does not indicate when such home status commenced. BIA data are not available to determine the home status commencement date. However, Arbitron had included the station in the Metro at least since 1997. *See* Waiver Request, Attachment 2 (providing Arbitron ratings information dating back to 1997 for the station). We note that Arbitron ratings figures are not directly comparable to BIA audience shares.

WBLA(AM), also licensed to Elizabethtown, was not listed by BIA as being home to the Fayetteville Metro as of September 3, 2004 , and is not presently listed as home to any Metro. The proposed ownership of WBLA(AM) is thus tested solely under the Commission's interim contour-overlap methodology to determine compliance with Section 73.3555(a) (*see Ownership Order,* 18 FCC Rcd at 13730), while ownership of WGQR(FM) is tested under both the Arbitron-based and contour-overlap methodologies. Staff analysis confirms rule compliance under the interim contour-overlap methodology for both stations.

[12] Beasley states that Arbitron no longer included WGQR(FM) in the Fayetteville Metro as of November 5, 2004. *See* Waiver Request at 1, n.2. In the *BIA Letter*, *supra* note 8, Mr. Fratrick states that BIA also changed WGQR(FM)'s home designation as of November 5, 2004.

[13] This is based on the latest BIA data, made publicly available on June 1, 2005. As of September 3, 2004, BIA data showed 23 commercial and noncommercial home stations. The change since then does not affect our analysis: the market tier is governed by 47 C.F.R. § 73.3555(a)(iii) using either set of data.

[14] S*ee* 47 C.F.R. § 73.3555(a)(iii).

longstanding marketplace realities."[15] Beasley requests that the Commission waive the two-year waiting period requirement to allow the transaction to proceed immediately. According to Beasley, WGQR(FM) is not a competitor in the Metro and grant of the Waiver Request and the Assignment Applications "will have at most only minimal, if any, impact on radio competition."[16] Citing the decision in *Silver King Broadcasting of Vineland, Inc.,*[17] Beasley states that the Commission "may waive its local multiple ownership rules 'where application of fixed multiple ownership standards would be contrary to other public interest concerns,'" and argues that its Waiver Request meets this standard.[18] Beasley's specific arguments in support of the Waiver Request are addressed below.

Discussion

Beasley argues that because of its "geographic separation" from the Metro, WGQR(FM) does not compete in the Metro. Elizabethtown is, Beasley states, more than 30 miles from Fayetteville and more than 20 miles from the city of Lumberton, "the two largest population centers" in the Metro.[19] Moreover, Beasley asserts, WGQR(FM) "fails to place a 70 dBu signal over any part of the Fayetteville Metro," covers only a small portion of the Metro with its 60 dBu signal, and fails to achieve any reportable audience share in the Metro.[20]

Although geographic location and signal strength might prevent a station from becoming a dominant player in a Metro, they do not establish that a station cannot compete there. We reject Beasley's assumption that we should treat a station as properly listed above the line only if the station serves virtually the entire Metro -- or at least a substantial portion of it -- with a signal strength of 60 dBu or better. Contrary to Beasley's presumptions, we find that 70 dBu and 60 dBu contours are not the material signal strength contours in determining whether a station can compete for listeners in a Metro. It is not uncommon for listeners to receive a satisfactory signal at 54 dBu (the protected signal strength contour for Class B stations).[21] In fact, WGQR(FM) concedes that the station provides some signal coverage as far as Fayetteville.[22] Many stations with limited coverage are listed by BIA as home to rated

[15] Waiver Request at 4.

[16] *Id.* In the *BIA Letter* included with Beasley's April 2005 Supplement, Mr. Fratrick states that BIA's criterion for "including a station in a Metro" once Arbitron has removed the station from its own reports "is when that station's audience share is higher than half of the other stations that are above the line . . . ." He states further that WGQR(FM) fails to meet that criterion.

[17] 2 FCC Rcd 324, 324 (1986) (subsequent history omitted). The *Silver King* letter decision, signed by then-Commission Secretary William J. Tricarico "by direction of the Commission," waived the TV duopoly rule to permit common ownership of two UHF stations with overlapping Grade B contours. The decision noted that both stations had a history of financial difficulties since their inception and that grant of the waiver "may offer the only opportunity for [the stations] to enhance . . . their ability to compete effectively in highly competitive markets." *Id.*, 2 FCC Rcd at 325.

[18] Waiver Request at 3.

[19] *Id.* at 5.

[20] *Id.*

[21] *See* 47 C.F.R. 73.215(a)(1) (indicating also that Class B1 stations are protected to 57 dBu).

[22] *See Waiver Request,* Attachment 4, Declaration of Lee W. Hauser, President and General Manager of Sound

markets. For example, WKQB(FM) is also listed as home to the Fayetteville Metro, notwithstanding the fact that its 70 dBu contour does not overlap the Metro's geographic boundary and its 60 dBu contour covers only a portion of Fayetteville.[23]

The data also show that zero audience shares do not necessarily correspond to non-home status. As of September 3, 2004, in addition to WQGR(FM), BIA listed stations WCEI(AM) and WAGR(AM) as home to the Fayetteville Metro notwithstanding their zero audience shares for the Spring 2004 rating period. These stations also had zero audience shares for the prior Fall 2003 period and were listed above the line. According to the revised BIA data reflecting the more recent Fall 2004 rating period (and WGQR(FM)'s recent redesignation), WCEI(AM) continued to have a zero audience share but was nonetheless still listed as a home station.[24]

We also reject Beasley's assertion that sources of advertising revenue and certain stations' advertising rates support its contention that WGQR(FM)'s home designation has been an aberration.[25] Mr. Hauser states that "more than 75% of the advertising sold on WGQR(FM) comes from advertisers located outside" the Metro.[26] Even if we were to accept this unsupported claim as true, the remaining portion of in-Metro revenues (nearly 25%) is not insignificant, especially in light of Mr. Hauser's explanation that the station has a very small staff and is under budget constraints.[27] Clearly some businesses in the Metro view WGQR(FM) as an alternative to other stations in the market. Smaller in-Metro advertisers may prefer a lower rate and accept the likelihood of a small audience as the trade-off. Moreover, these figures do not mean the station could not sell more advertising to in-Metro entities. Indeed, Beasley pledges that as owner of the station, it would enhance the sales staff and sales training resources (in addition to other station enhancements)[28] to make the station "more competitive with other stations in the region."[29]

Beasley also submits a declaration by the president of an ad agency in the Metro, Anna Hodges Smith, who manages accounts for five businesses in Fayetteville purchasing ad time on stations in the

---

Business ("Hauser Declaration") ¶ 8.

[23] Like WGQR(FM), WKQB(FM)'s community of license, Southern Pines, NC, is physically located outside the Metro.

[24] For the Fall 2004 period, WAGR(AM)'s rating increased from zero to 0.7. For the same period, Beasley's station WTEL(FM), Red Springs, NC, had a zero audience share, down from a 0.6 share for Spring 2004.

[25] *See also* Waiver Request at 4, n.8 (characterizing the listing as "purely cosmetic").

[26] Hauser Declaration ¶ 6.

[27] *See id.* ¶ 9. In fact, Mr. Hauser indicates that some portion of the advertising sold on the station – albeit "less than 5%" – comes from advertisers located in Fayetteville. *Id.* ¶ 7.

[28] Supplement at 2-4; Waiver Request at 7-8. *See also id.,* Attachment 5 (declaration of Danny Highsmith, General Manager of the Beasley Stations). Among other benefits, Beasley asserts that the acquisition will "enabl[e] an upgrade of the [Stations'] facilities to improve emergency operation capabilities," that Beasley will "increase[e] the involvement of the [Stations] with community groups," and that WGQR(FM) will be able to provide local news and weather information to the Elizabethtown area through access to Beasley's resources. According to Beasley, such public interest benefits outweigh the alleged minimal impact on competition. *See* Waiver Request at 8.

[29] Supplement at 2-3.

Metro and adjacent Bladen County.[30] Ms. Smith states that "the cost of advertising time on WGQR is significantly lower than the cost of advertising time on comparable stations located in the [Metro] or on stations that achieve significant listener ratings in that Metro."[31] Ms. Hodges does not give actual advertising rates for any station, including WGQR(FM), and does not explain or give examples of what is a "comparable station." In any event, the existence of a disparity in advertising rates among stations in a Metro is not meaningful or probative of whether or not a station competes in that market. The new radio rule assumes that not all stations compete on the same level: it does not distinguish among technically weaker and stronger stations, for example.[32] We would expect some disparity in ad rates, based primarily on audience shares, which in turn can reflect myriad factors such as programming quality, format choice, or perhaps overall station management, in addition to technical capabilities.[33] Thus, once again, while the evidence may demonstrate that WGQR(FM) is not one of the stronger competitors in the Metro, it does not establish that the station is not a market participant or that the listing of the station in the market is an aberration.

An applicant for waiver "faces a high hurdle"[34] and must demonstrate that deviation from the general rule is warranted by special circumstances and will serve the public interest.[35] We have given Beasley's Waiver Request the requisite "hard look"[36] but do not find a sound basis to grant it. The Commission was unequivocal in the *Ownership Order* that reliance on Arbitron market boundaries and BIA home station designations – a "more rational market definition" – is the mainstay of a rule that "in virtually all cases . . . will protect against excessive concentration levels in local radio markets that might otherwise threaten the public interest."[37] The Commission considered the potential problems noted by commenters in relying on such data and adopted the two-year "safeguard" to help ensure the new rule's integrity.[38] We find that granting a waiver on the facts of this case would eviscerate this processing policy. BIA's recent delisting of WGQR(FM) in the Fayetteville Metro is illustrative of *exactly* the sort of situation the Commission considered in the *Ownership Order* and for which it established the two-year

---

[30] *See* Waiver Request, Attachment 3.

[31] *Id.*

[32] *See Ownership Order,* 18 FCC Rcd at 13732-33.

[33] *See id.*

[34] *WAIT Radio v. F.C.C.,* 418 F.2d 1153, 1157(1969) (*"WAIT Radio*") (*cited in Ownership Order,* 18 FCC Rcd at 13647).

[35] *See Northeast Cellular Telephone Co. v. F.C.C.,* 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969)). *See also* 47 C.F.R. § 1.3 (stating that rule provisions may be waived "for good cause shown"). The Commission declined to adopt any specific waiver criteria relating to radio station ownership in the *Ownership Order,* but stated that "[p]arties who believe that the particular facts of their case warrant a waiver of the local radio ownership rule may seek a waiver under the general 'good cause' waiver standard in our rules." *Ownership Order,* 18 FCC Rcd at 13746-47 (citing 47 C.F.R. § 1.3).

[36] *WAIT Radio,* 418 F.2d at 1157.

[37] *Ownership Order,* 18 FCC Rcd at 13813.

[38] *See id.* at 13726, 13728 and n.593.

waiting period provision. The two-year provision does not permanently bar a transaction; it merely requires the parties to wait to seek the Commission's approval.

In the Commission's public interest analysis under Section 73.3555(a), "[p]reserving competition for listeners is of paramount concern," and as Beasley observes, the local radio ownership limits promote competition by assuring that "a sufficient number of rivals are actively engaged in competition for listening audiences."[39] Beasley has not presented compelling evidence that BIA's inclusion of WGQR(FM) above the line as of September 3, 2004, and for years prior to that date, was an aberration.[40] Finally, we find that Beasley's pledged enhancements to the station[41] do not outweigh the harm of discounting WGQR(FM) at this time as an independent alternative for listeners in the Fayetteville Metro.

Having found on the record before us that grant of a waiver of 47 C.F.R. Section 73.3555(a) would not serve the public interest in this case, IT IS ORDERED, that the request for waiver filed by WKML License Limited Partnership IS DENIED. We evaluate the proposed assignment of licenses using BIA data as of September 3, 2004, counting WGQR(FM) as home to the Fayetteville Metro. On this basis, as stated above, the transaction does not comply with the rule. Accordingly, IT IS FURTHER ORDERED, that the applications to assign the licenses for stations WLBA(AM) andWGQR(FM), both licensed to Elizabethtown, North Carolina (File Nos. BAL-20040628AAX/AAY), ARE HEREBY DISMISSED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

---

[39] *Id. at* 13716.

[40] Notably, the *BIA Letter* does not state that the longstanding inclusion of WGQR(FM) as home to the Metro was an aberration, as Beasley alleges. It states, rather, BIA's conclusion that the station is now properly listed below the line, and that this is based in part on Arbitron's recent change in its reports. *See supra* notes 8 and 16.

[41] *See supra* note 28 and accompanying text.